90-817

Supreme Court, U.S.
FILED
NOV 23 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

-vs-

ELTON NASH,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

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QUESTION PRESENTED

DOES A POLICE PROCEDURE WHEREBY PEOPLE WALKING IN A NEIGHBORHOOD WHERE SEVERAL BURGLARIES HAVE OCCURRED ARE APPROACHED AND ENGAGED IN CONVERSATION, BUT NOT FORCIBLY DETAINED, RESULT IN A "SEIZURE" OF THAT PERSON, SOLELY BECAUSE OF THE PRESENCE OF UNIFORMED OFFICERS ON THE SCENE?

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NOW COME the People of the State of Michigan, by the Prosecuting Attorney for the County of Kent (Timothy K. McMorrow, Chief Appellate Attorney), and pray that a writ of certiorari issue to review the judgment of the Michigan Court of Appeals entered in the above entitled cause on March 16, 1990. Timely filed Petition for Rehearing was denied on May 17, 1990. The

Michigan Supreme Court denied a timely filed Application for Leave to Appeal on August 28, 1990.

OPINIONS BELOW

The opinion of the Michigan Court of appeals (32a), and the order denying rehearing (34a), are unpublished. The order of the Michigan Supreme Court denying leave to appeal (35a) is published at 435 Mich 880 (1990). The opinions of the Kent County Circuit Court (1a and 21a) are unpublished.

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was entered on March 16, 1990. Timely filed Petition for Rehearing was denied on May 17, 1990. Timely filed Application for Leave to Appeal was denied by the Michigan Supreme Court on August 28, 1990. The jurisdiction of this Court is invoked under 28 USC sec. 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers and effect, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment of the United States Constitution provides in pertinent part:

> "...nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Respondent was charged with unlawful possession of credit cards, MCL 750.157p; MSA 28.354(15), and as a fourth felony offender under the Michigan habitual offender statute, MCL 769.12; MSA 28.1084. The case arose when police officers approached respondent as he was walking in the area of Pontiac and Cambridge Streets in the City of East Grand Rapids, Michigan during the early morning hours of September 25, 1988. Respondent alleged he was impermissibly stopped on the street. Petitioner argued that this was a first-tier police-citizen contact, properly undertaken, and that respondent voluntarily cooperated with the police and answered all questions posed to him. The trial court accepted respondent's arguments and dismissed the charges.

At the hearing on respondent's Motion to Suppress, police officer Michael Ellis

testified that he observed respondent walking in the area at about 3:30 a.m. Ellis said there had been 40 to 45 unsolved burglaries in the area he was patrolling. (2a, 24a; T5)[1] Because of these burglaries, Ellis and other officers were approaching people they saw walking in the area. Ellis got out of his squad car, walked up to respondent on the sidewalk, and said "good morning." (T10) He asked respondent how he was, and respondent said fine. He asked respondent what he was doing, and respondent said he was just out for a walk. Ellis then asked where respondent was coming from, and respondent said he was coming from a hospital and was on his way home. Respondent had given his home address, but was

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[1]References will be to the appendix where the trial court stated the appropriate fact. References beginning with "T" refer to the transcript of the suppression motion held in the trial court.

walking in the wrong direction from the hospital if he in fact were going home. (T11) Ellis though it odd that respondent should be visiting someone at 3:30 a.m. in the hospital, so he asked another officer (one of two officers who came upon the scene sometime after the initial encounter, 3a, 6a) to check if there was someone at the hospital under the name of the person respondent said he was visiting; this officer later radioed back that there was no one at the hospital under that name. (T30)

Officer Ellis asked respondent if he had any identification. Respondent produced a parole paper with his name on it and the terms of parole. One of those terms was that respondent refrain from the use of alcohol; it was apparent that respondent had been drinking. (T12) Ellis testified that respondent was not under arrest at this time, and was free to

leave. A police lieutentant then arrived on the scene, and told Ellis that there had been an incident a few days before at a hospital involving respondent. (12a-13a) Ellis asked respondent if he had any further identification. Respondent said no. Ellis saw what appeared to be the bulge of a wallet in respondent's back pocket and asked respondent if he would mind pulling out the wallet and putting it on the hood of Ellis's squad car. (2a) The defendant, who was continually cooperative, pulled out his wallet, and when asked if he minded opening the wallet, said "no, not at all." (T14) Respondent opened the wallet, and Ellis saw several credit cards. Ellis asked respondent if he minded if Ellis checked the contents of the wallet, and respondent said he did not mind. Ellis saw different names on the credit cards. (27a) Respondent told Ellis that his girlfriend had given him the

credit cards with permission to use them; however, he gave a different name for his girlfriend than appeared on the cards. (T17) Ellis kept the credit cards, and told respondent that he was going to check if they were stolen. Respondent then left. At no time did Ellis place respondent under arrest. (4a)

The Kent County Circuit Court ruled that respondent was stopped when initially confronted by Officer Ellis, and that this initial stop was improper, since not based on any specific crime. The Court ruled that it was reasonable for respondent to believe that he was detained by the initial encounter, as well as by the subsequent "polite but firm" (10a) request for identification. (8a) The Court further held that, absent an indication by the police that respondent was free to go, respondent could conclude that he had to answer the police inquiries. (9a-10a)

Petitioner applied for rehearing. On rehearing, the Circuit Court held that the police effectively demanded identification from respondent, that the presence of three officers was coercive and amounted to a stop of respondent. (26a-27a)

The Michigan Court of Appeals affirmed, stating simply that they found no abuse of discretion in the trial court's ruling. (32a) Petition for Rehearing was denied. (34a) The Michigan Supreme Court denied leave to appeal. (35a)

REASONS FOR GRANTING THE WRIT

Petitioner submits that this case raises a question left unanswered by this Court's opinion in Florida v Royer, 460 US 491; 103 SCt 1319; 75 LEd 2d 229 (1983) and Michigan v Chesternut, 486 US 567; 108 SCt 1975; 100 LEd 2d 565 (1988), and involved in this Court's recent grant of certiorari in Florida v Bostick, No. 89-1717, cert. granted October 9, 1990: does the presence of uniformed police officers in an arguably "coercive" setting mean that the police have "seized" a person approached and questioned, when that person stops in response to a single officer's approach of him and willingly answers questions and produces evidence? Petitioner submits the answer is no. More importantly, Petitioner submits this question, addressed in various contexts by several courts, and currently being addressed in a different context in

Florida v Bostick, supra, is one on which this Court should grant certiorari.

Prior pronouncements of this Court show that there are three tiers of police-citizen encounters. There is a simple contact, for which no level of cause or suspicion is required; a Terry stop, Terry v Ohio, 392 US 1; 88 SCt 1868; 20 LEd 2d 889 (1968), for which an officer needs reasonable and articulable suspicion that criminal activity is afoot; and an arrest, requiring probable cause. In Florida v Royer, supra, Justice White's plurality opinion noted that "law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such

questions. . . . Nor would the fact that the officer identified himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification." Royer, 460 US at 497. "If there is no detention -- no seizure within the meaning of the Fourth Amendment -- then no constitutional rights have been infringed." Royer, 460 US at 498. In United States v Mendenhall, 446 US 544; 100 SCt 1870; 64 LEd 2d 497 (1980), the Court had earlier upheld a finding that a suspect voluntarily consented to accompany agents to a Drug Enforcement Administration Office and then consented to a strip search for narcotics, since the defendant was simply asked, not told, to accompany the agents and employed neither threats nor a show of force. Justice Stewart, in a plurality opinion, wrote that a person has been "seized" under the Fourth Amendment only if, in

view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. A majority of the Court has since adopted this test, Immigration and Naturalization Service v Delgado, 466 US 210, 228; 104 SCt 1758; 80 LEd 2d 247 (1984). In Michigan v Chesternut, supra, the Court made clear that it was following the Mendenhall-Royer test in finding that the respondent in that case was not "seized" when followed by police officers, since the police action in that case was not so intimidating that respondent could reasonably have believed that he was not free to disregard the police presence.

May the police, without some level of cause or at least reasonable suspicion based on specific and articulable facts, demand identification? No, of course not, Kolendar v Lawson, 461 US 352; 103 SCt 1855; 75 LEd 2d 903 (1983). The instant

case presents the issue in a slightly different context, however. Here, the Kent County Circuit Court held that the request for identification was a demand, due to the supposedly coercive atmosphere created.

Various Courts have split on the issue of when a police request becomes a "demand" so that the suspect has been "seized." In Gomez v Turner, 672 F2d 134 (DC Cir, 1982), the Court held that a mere request from a police officer for identification is not a "show of force" amounting to a seizure. In United States v Lehman, 798 F2d 692 (4th Cir, 1986), the Court held that where a defendant was free to refuse an initial request for questioning and a search of his bag, he was not seized and the questioning and search were proper. In United States v Maragh, 894 F2d 415 (DC Cir, 1990), the Court held that a request by plainclothes drug

interdiction police officers, who identified themselves as officers, that a suspect identify himself and a request to search a shoulder bag he was carrying, was not a "seizure" of the suspect. On the other hand, in Florida v Bostick, supra, Florida opinion reported as Bostick v Florida, 554 So2d 1153 (Fla 1989), the Florida Supreme Court held that police action in boarding a bus and asking a passenger for consent to search his luggage was a seizure of that person, and in the absence of specific facts justifying the seizure, held the seizure unreasonable. The Federal Courts and the state courts, at least of Florida and Michigan, are split on this issue.

In this case, the trial court found that respondent may have felt he was not free to leave, due to the presence of three officers, two of whom arrived after Officer Ellis first approached and talked

with respondent, and that respondent was therefore seized due to the combination of coercive circumstances which were allegedly present. The Court held that the presence of uniformed officers created a coercive environment which led respondent to possibly believe he was seized. The mere presence of police officers, who never threatened respondent, never attempted to detain him, merely asked him questions, and continued to do so because of his cooperation, cannot, we submit, translate into a "seizure" of a suspect.

The trial court cited People v Shabaz, 424 Mich 42; 378 NW2d 451 (1985), cert granted 475 US 1094, cert dismissed as moot 478 US 1017 (1986), as controlling. (21a) Shabaz adopted the Royer three tier analysis of police citizen encounters, but misapplied this test to find a defendant was seized when police officers ran after him. That issue,

whether a police officer seizes a suspect by chasing after him, is a different question currently being addressed by this Court, California v Hodari D., No. 89-1632, cert granted October 1, 1990. Still, the opinion in Shabaz and the trial court's reliance on that opinion shows that Michigan courts are still confused on the issue of what constitutes a seizure of a suspect in various disparate settings.

As previously noted, this Court has granted certiorari in Florida v Bostick. The instant case also presents the issue of when a concensual encounter becomes a "seizure" in a slightly different context. The instant case does not involve a bus or other public transportation, nor does it involve a drug interdiction program. It does, however, involve a so-called "saturation patrol" and the question of what action the police may or may not take in investigating a series of

ongoing crimes. We respectfully submit that the instant case supplies this Court with the opportunity to address this issue in a recurring factual setting, and that a definitive pronouncement on the propriety of the police action undertaken here will resolve conflicting opinions between the state courts and the federal courts and wil be of jurisprudential significance. We therefore respectfully request that this Court grant certiorari.

CONCLUSION

WHEREFORE, Petitioner respectfully prays that this Court grant plenary review, reverse the Michigan Court of Appeals, hold that the mere presence of police officers on the scene of a first tier citizen police encounter does not amount to a seizure of a person, and remand for proceedings not inconsistent with this Court's opinion.

In the alternative, Petitioner respectfully prays that this Court first decide Florida v Bostick, and remand this case for proceedings not inconsistent with the Court's decision.

Respectfully submitted,

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff, vs. ELTON NASH, Defendant.	Circuit Court No. 88-46078-FH FEBRUARY 7, 1989 OPINION OF THE CIRCUIT COURT GRANTING MOTION TO SUPPRESS

THE COURT: This is a difficult case for a number of reasons, one of which is I think it skirts very closely the line of propriety of police conduct under the constitution.

It's made even more difficult in some respects by virtue of the fact that in analyzing the totality of events which ensured from the arrest, it's quite apparent that what we have here is, in effect, good police work. We have police who, perhaps, are engaged in, for lack of

a better term, might be called "saturation patrol," essentially accosting anybody abroad at night in a particular area of East Grand Rapids.

In the process of accosting the defendant, Officer Ellis obtains information which to his mind appears suspicious and upon the arrival of further officers and further inquiries, ultimately the officer asks the defendant to produce a wallet which he sees from a bulge in his pants, is probably in his pocket. The defendant does so. The defendant is then asked to open the wallet and upon opening the wallet on the hood of a police cruiser under the illumination of a police flashlight, Officer Ellis sees first one and then two more credit cards, all of which are in the names of different persons and, evidently, at least two of them were reported stolen and gave rise ultimately to the charges which bring us to court here today.

It's also, I think, significant at least in retrospect to note that after substantial inquiry of the defendant consuming several moments during which other members of the police department arrived at the scene, the defendant was ultimately released which, I suppose in retrospect, gives rise to the assumption that he was not placed under arrest but was free to go, as Officer Ellis has told us here today, at various points during the detention and talk that he had with the defendant.

The problem I think articulated by defense counsel and somewhat difficult when you're trying to apply a normal standard of logic, is that to a large extent the subsequent developments are not pertinent to the inquiry of whether the initial stop was proper. And this form of constitutional analysis has always been troublesome to me personally and perhaps

by virtue of my many years experience in the Prosecutor's Office and in the lower courts before coming here. And it always seemed silly not to be able to look into what ultimately developed as a basis for determing the propriety of the initial stop.

And, yet, I'm afraid that for purposes of constitution analysis we really aren't allowed to do that. We aren't allowed to bootstrap our way from what we find or what we do after the fact to go back to the initial intrusion and justify its constitutional propriety.

The fact of the matter is that evidence of criminal wrongdoing was produced as a result of Officer Ellis's suspicious inquires and ultimately the defendant was released, apparently the credit cards being retained, so that the police might further investigate the matter and he was only arrested after the

fact, apparently when a warrant was secured for his arrest upon subsequent review by the prosecutor.

There are a couple of problems, it seems to me, that occur if we put that information aside and go back to the initial accosting of the defendant by Officer Ellis.

First, the defendant is apparently walking through a residential neighborhood in East Grand Rapids in the area of Cambridge and Pontiac -- which I'm willing to take judicial notice of; I drive through there frequently myself -- is an area of large, old homes, probably many of them 50, 60 years old and I am aware from prior cases in this court and as well as from merely social conversation around two that at the time of the events in question there were a number of burglaries in these homes and there were significant difficulties which apparently gave rise to heavy patrols by the East Grand Rapids Police.

That apparently is why Officer Ellis was involved in what he described as a heavy patrol by which I think he means a fairly intrusive patrol in which persons abroad late at night were routinely inquired of. And that's probably also why within a few minutes that he was there talking to the defendant, Officer Gingrich and Lieutenant Bowman also drove up. Apparently there was a lot of patrolling going on in that area, I suppose in an effort either to deter the incorrigible burglars or possibly to apprehend them in the act.

It's significant to note, however, unlike some of the cases which have been cited to the Court by the prosecutor, that there was no specific report of any actual criminal activity afoot at the specific time that the defendant was stopped by Officer Ellis. I refer particularly to the case of People v Peyton, P-e-y-t-o-n,

167 Mich App 230, 1988 and People v Daniels, 160 Mich App 614, 1987. In both cases defendants were accosted by the police who were responding to dispatch looking into specific acts of criminal conduct reported by the citizenry to the police in the general area where the defendants were stopped.

Here, there was a pattern of criminal activity but no specific reports of wrongdoing at that particular defendant might have been a suspect. It was just a fact that there were routinely problems in the areas and routinely the police were making inquiries of persons abroad at that particular time.

The second potential problem, it seems to the Court, is that although the defendant was ultimately released, the credit cards being retained by the police for further investigation, at the time he was accosted by Officer Ellis and asks

several questions and ultimately requested to produce first ID and then later a wallet, he was in a situation where a person in obvious authority, a uniformed officer armed and with flashlights and ultimately reinforced by two other uniformed officers, certainly created an on-the-street police dominated atmosphere in which, it seems to the Court, there would be a reasonable question in the defendant's mind as to whether his freedom of movement was being significantly interfered with by authorities.

So, while he was not placed under arrest by the exercise of any magical words by the police and was not handcuffed or put into a cruiser and, indeed, was ultimately released, it seems to the Court that there is a reasonable basis for the defendant to believe at the time of these inquiries by one, then two, then three officers, that he, indeed, was detained by

police on the street and was not free to go even though, as Officer Ellis tells us, he certainly was.

This is probably a situation where, if Thomas Jefferson's wish had been true, all citizens would be thoroughly knowledgeable of the constitution and its various ramifications and would be fully aware of whether they were free to go or not, and the average citizen, having gone through thorough indoctrination into constitutional law principles in school, would be able to tell the police, if so inclined, to buzz off and go on about their business.

But I'm not sure in the real world that citizens are, in fact, so well informed of the constitutional provisions that are operative here and absent some clear indication that they're free to go, whether a person in Mr. Nash's position at that time of night at that location would

reasonably believe that he was free to go at all or that he was under any freedom of motion or that he was free to do anything except comply with the polite but firm request put to him by the authorities.

Now, beyond that, we have to look into the issue raised, I think, in Brown v Texas, cited by Ms. Krause, which is the whole question of whether a person may reasonably be stopped by the police on the street and asked to supply identification because they are abroad late at night when there is no environment of specific articulable basis for believing that person is engaged in criminal activity and that, it seems to me, is the troublesome problem we have here.

Now, we can argue about Mr. Nash's being black or white or otherwise or whether Officer Ellis knew he was black when he saw him in the car or only after he got out. He certainly is black and he

has something of almost an Afro-type hairdo which would make it fairly apparent at a distance that he was probably black. But I'm not sure that ethnicity enters into here.

I don't think it matters whether he was Irish or Polish or Hispanic or black or white or Native American or anything else. The real issue is can the police simply routinely stop somebody for walking down the sidewalk at 3:00 in the morning, make inquires and require them to prcduce identification.

Clearly, given the case authority from the Michigan Court of Appeals cited by Mr. Bloemers, they can if they are responding to a specific complaint of criminal activity at that particular time and place where the defendant is at least a possible suspect of wrongdoing.

Here, however, there is no complaint of specific criminal activity. There's

been no report of a B & E at that particular time and place. Rather, a saturation patrol is ongoing to scrutinize the area for possible suspects who might be involved in burglaries but no specific crime reported at that particular point.

And it seems to the Court that under the rule articulated in Brown v Texas, there is a problem here with the police simply stopping somebody and requiring them to produce ID in the total absence of any reported specific criminal activity or in the total absence of any articulable basis for believing the defendant may have committed some crime.

Indeed, the crime which was ultimately uncovered through this process had nothing to do with breaking and enterings in the residential area. It appears that what happened was the defendant had been engaged in some light-fingered exercise, stealing credit cards from persons at

Blodgett Hospital, totally unrelated to the rash of residential burglaries in the area of Cambridge and Pontiac at that particular time and place. So, the criminal activity uncovered was totally unrelated to the initial suspicions of the officer.

So, if we are going to do some retrospective analysis and justify the conduct of the authorities at the time of the arrest based on what they found, we have to point out that what was found was not what was suspected but totally unrelated criminal activity which the authorities then became aware of.

I'm inclined to believe that there is no articulable basis for detaining a defendant in the position of Mr. Nash and requiring him to produce identification even though it's probably good police work. Indeed, we have excellent police work in police states where the police

have the authority to stop anybody at any time and require them to produce evidence of their reason for being abroad and their identification.

I suspect the crime rate in the Soviet Union and in South Africa is much lower than we have here where the arrest rate and clearance rate for criminal activity is much higher. But that's because society in those particular environments countenance and, in fact, encourage a much higher and more incursive and intrusive level of police conduct than in the United States we're inclined to allow.

It has to be recognized that the persons who framed the constitution in the first place and wrote the Fourth Amendment were all people who had been smuggling goods into the country illegally during the colonial period and most of them had guns they weren't supposed to have in

their possession. And, perhaps for that reason, they created the curious anomaly of a hierarchy of values which puts the citizen's right to be simply left alone in the absence of probable casue to believe they're involved in criminal activity higher than the right of the police to uncover evidence of wrongdoing.

This is a somewhat unique exercise in American jurisprudence which is sneered at by much of the world and, indeed, sometimes I find it rather nexing and vexing myself but, nevertheless, that is the law.

Secondly, I'm inclined to conclude that a person in Mr. Nash's position might reasonably conclude, based upon the nature of the inquiry and the subsequent arrival of more officers, that he was, in fact, not free to leave and that he was obliged to comply with the officer's requirement that he empty his pockets thereby disclosing evidence of totally unrelated wrongdoing.

So I find myself in the unusual position of saying here we have an example of what turns out to be excellent police work but at the same time saying, in my opinion, it's excellent police work which violates the constitutional protections articulated by the United States Supreme Court in Brown v Texas and elsewhere.

Making that conclusion requires the Court to reluctantly conclude that a person under Mr. Nash's circumstances is not to be accosted and have evidence taken from him in the fashion that it was, even though it's perfectly good evidence pointing out his guilt of unrelated crime.

Therefore, following its duty and doing so somewhat reluctantly, the Court is going to grant the motion to suppress evidence at this time, presuming that there is no further evidence which will link the defendant to these particular crimes, and will direct that an order

enter quashing the information and discharging the defendant from his bond in this case.

I'm given to understand he's detained for some other reasons and, therefore, he will be remanded to custody to await further court proceedings on whatever the other matters are that he has pending against him.

Thank you.

MR. BLOEMERS: I have one comment, your Honor. The Court is referring to People v Brown, which was supplied to the Court today. People v. U.S. Sharpe -- excuse me, U.S. v Sharpe, decided as 105 Supreme Court 1568. In this case there is no articulable basis for the stop either. This is where a parole officer -- excuse me, a border patrol officer sees a truck driving down the road, sees the truck having a little too much weight in it, and makes a stop under those circum-

stances, and that was nothing more than, again, investigatory stop. There was no reason to believe that there -- he did any crime under those circumstances.

THE COURT: I think a border patrol investigation is inherently of a different type of nature especially where we see an obviously overloaded truck in the vicinity of the border. I think it's quite different than having a situation here where someone is simply walking down the street in an area where there've been a lot of burglaries. There is nothing about Mr. Nash's walking down the street suggestive of criminality whereas an overloaded truck near the border does have an articulable basis to suggest criminality, in my opinion.

I agree it's a close question but I believe the close questions on constitutional principles have to be resolved in favor of vindicating the principle and I

think the doubt must go to the accused under those circumstances.

MR. BLOEMERS: I'd also ask the Court to explain one term it's been using through here is "accost." I don't understand where the accost came from. Saying, "Hello, good evening, sir, how's it going," if the Court intends to infer that that's some type of accosting. What does the Court meaning when it uses that term?

THE COURT: I think accost, as defined in the dictionary, is walking up to somebody and inhaling and engaging them in some conversation.

MR. BLOEMERS: If that' what the Court intended when it said accost, then -- if that is the definition --

THE COURT: I think that's probably the common meaning. I didn't mean to suggest anything dark and dour or necessarily nefarious.

MR. BLOEMERS: It sounds so evil, your Honor.

THE COURT: Perhaps the dictionary writers should be notified that they could come up with a softer word.

MR. BLOEMERS: Thank you, your Honor.

(Court adjourned.)

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs.

ELTON NASH,

Defendant.

/

Circuit Court
No. 88-46078-FH

MARCH 17, 1989
OPINION OF THE CIRCUIT COURT DENYING MOTION FOR REHEARING

THE COURT: This is an extremely difficult area of the law in which fine differences in factual situations can make a significant difference in the outcome of the case.

I have been attempting to, if you will, bone up on the law in this area since our last court hearing. It seems to me that the most recent clear statement of the law, at least insofar as Michigan is concerned, is found in the decision of People v Shabaz, 424 Mich 42, 1985. This

case summarizes the law in this area, being opinion by Justice Ryan who is pretty good at doing that sort of thing, primarily, I think, because Justice Ryan doubles as a law professor and so he tends to lay out the precedence fairly nicely.

Shabaz is a case which is somewhat similar to what we have here. The Detroit Police Department stopped the defendant in the area of Clairmont and Woodward, which is described as a high crime area in Detroit. And I might note parenthetically having lived not too far from there while a law student and having spent a considerable amount of time in the area of Pontiac and Cambridge in East Grand Rapids where this case has its situs, that it can be observed that the high crime rate of Pontiac and Cambridge in East Grand Rapids look like a Baptist camp meeting by comparison.

But, in any event, the Detroit officers apparently stopped the defendant, Mr. Shabaz, when he came out of an apartment building holding a paper bag and seemingly tried to stuff the paper bag in his pants or under his shirt or something, from which the police concluded he was up to no good and, in an effort to contact him and discuss the matter with him, he saw them and took off and they chased him running and ultimately he dropped or discarded or lost the bag which was found, typically in Detroit fashion, to contain a Smith & Wesson .357, and he was charged with CCW.

The Supreme Court affirmed the Court of Appeals which affirmed a Detroit Recorder's Court Judge decision dismissing the case on the grounds that the stop was not adequately supported by an constitutional basis. The Court concluded that something above what the police saw here

is required to stop and detain the defendant, and that there was no articulable basis, based on the facts in the record, to conclude that Mr. Shabaz was about any criminal activity, other than that he was in a high crime area. Walking around with a paper bag and stuffing it under his shirt was held not to be sufficient to give rise to any sort of reasonable inference of criminal activity.

Now, again, against that background, we go into the considerably more rarified atmosphere of Cambridge and Pontiac in East Grand Rapids which is, of course, an area where a lot of breaking and enterings have, in fact, occurred, and I believe that fact is established in the record. To attempt to deal with that, the East Grand Rapids Police Department has, apparently, put on what amounts to a saturation patrol in the area where they really are watching everything very

closely and, apparently, part of the purpose of the patrol, or part of the function of the officers in it, is to check people out who are abroad late at night in East Grand Rapids. Into that situation, Mr. Nash, the defendant, finds himself walking down the street at about three o'clock in the morning.

We've tried to skirt the issue of race in this matter, and I'm not sure that it's a big issue, but the main factors are that the defendant is black and he's walking down the street in this residential part of East Grand Rapids and it's three o'clock in the morning.

For those reasons -- at least two out of three of those reasons -- the East Grand Rapids Police encountered him and, as the officer testified at both hearings, stopped him and there's no doubt in my mind that this constitutes a stop. He was asked a few questions, "Hi, how you

doing," type questions, and the case law seems clear that that's all right. He can do that and if the defendant finds himself constrained to admit a string of criminal activity as a result of these inquiries, he may be held accountable and prosecuted and the statements may be used against him. That seems to be clear in Florida v Royer, 460 US 491.

The problem here is that, having asked the usual pleasantries, "Hi, how are you? Isn't it a nice evening?" type questions, Officer Ellis then says, "Give me some ID." And the defendant then, of course, produces his parole papers and then the situation steadily goes downhill for Mr. Nash thereafter.

The police department is subsequently reinforced and we wind up with three different officers surrounding Mr. Nash and he's ultimately asked to produce his wallet and put it on the hood of the

police car and open it up and reveal its contents and, of course, then a number of credit cards emerge which, apparently, are not the property of Mr. Nash, and subsequent investigation reveals that one or more of them was stolen from the purse of some person at a nearby hospital. And that was the nefarious activity about which Mr. Nash was engaged when he was stopped.

The problem, it seems to me, is that while the Florida v Royer decision makes clear that the police can engage people in idle conversation and use against them statements they make, that, absent some articulable basis, they cannot detain them and ask them for identification. I believe the case out of California, Kolender v Lawson, 461 US 352, 1983, establishes the police cannot, without more, stop and ask somebody for identification.

That's what's really done here and, of course, ultimately that's where we get into difficulty -- or, Mr. Nash does -- with the authorities.

MR. FORSYTH: Your Honor, can I just say something more in that regard?

THE COURT: Yes.

MR. FORSYTH: As I understand it, though, they didn't ask him for any type of identification until after he had told them that he was en route home from Metropolitan Hospital. He was going the wrong direction to be going home from Metropolitan Hospital. They asked him who he was visiting at Metropolitan Hospital; he gave a name. They checked out the hospital and found out nobody at the hospital had that name. I don't think it was until after that that they asked him for identification or for his driver's license.

THE COURT: At some point they sent an officer over to Metropolitan Hospital to check out the status of the person whose name he supplied.

It seems to me the other difficulty we have along this line is that, while these successive groups of officers come up and this inquiry becomes somewhat protracted, Mr. Nash, while certainly not under arrest and, indeed, was released at the end of the interrogation, had no reason to believe, from my analysis of the facts, that he was free to go about his business. And it seems to me that under the Shabaz analysis, when someone has a reasonable belief that his freedom of movement has been significantly circumscribed, he is, in fact, detained for purposes of the Fourth Amendment -- or, I guess the word they use is "seized."

Somewhere during this rather lengthy discourse, he is required to produce

identification under circumstances which, while he may be giving rather strange-sounding answers concerning his route through East Grand Rapids, does not, in my estimation, indicate any criminal activity.

I do believe that if we stopped everybody abroad on the streets at three o'clock at night and sufficiently scrutinized them we'd probably catch a lot of crooks. Indeed, they do that in most parts of the world very successfully. It is the genius of our constitutional system that crooks are allowed to go abroad unaccosted until such time as some reasonable suspicion exists for detaining them. Reasonable minds may differ as to whether an organized society can long endure such constitutional freedoms but it seems to me that's not a debate that should be conducted in this courtroom.

In my opinion, the Shabaz case involves facts considerably more egregious than those in this case. Frankly, my own feeling is that Shabaz gives some reasonable basis for detaining the defendant and checking him out, whereas, the Supreme Court said that it didn't.

If the Supreme Court doesn't find there's enough grounds in Shabaz to warrant a stop of this sort, then it seems to me the courts will never find that there's enough basis for detaining Mr. Nash for investigatory inquiries. And, for those reasons, I'm inclined to deny the motion for rehearing and permit Ms. Krause to submit an order accordingly.

Thank you.

S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE
OF MICHIGAN,
Plaintiff-Appellant,

March 16, 1990

vs.

No. 117233

ELTON NASH,

Defendant-Appellee.

---/

Before: Cavanagh, P.J., and McDonald and Marilyn Kelly, JJ.

MEMORANDUM.

The people appeal as of right from a March 20, 1989, order quashing the information against defendant entered after the trial court granted defendant's motion to suppress certain evidence allegedly seized in violation of defendant's fourth amendment rights. We affirm as our review of the record does not leave us "firmly convinced" that a mistake has been made. We cannot say that the trial court's ruling was clearly erroneous. People v

Lillis, 181 Mich App 315; _____ NW2d _____ (1989).

Affirmed.

/s/Mark J. Cavanagh
/s/Gary R. McDonald
/s/Marilyn Kelly

Court of Appeals, State of Michigan

ORDER

PEOPLE OF MICHIGAN V ELTON NASH	Mark J. Cavanagh Presiding Judge
Docket # 117233	Gary R. McDonald Marilyn Kelly
L.C.# 88-46078-FH	Judges

The Court orders the motion for rehearing is DENIED.

Judge Marilyn Kelly would GRANT rehearing based on People v Arterberry, 431 Mich 381 (1988).

A true copy entered and certified by Norbert G. Jaworski, Chief Clerk, on May 17, 1990.

/s/ Norbert G. Jaworski, Chief Clerk

ORDER
Entered: August 28, 1990

MICHIGAN SUPREME COURT
Lansing, Michigan

Dorothy Comstock Riley
Chief Justice

Charles L. Levin
James H. Brickley
Michael F. Cavanagh
Patricia J. Boyle
Dennis W. Archer
Robert P. Griffin
Associate Justices

PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff-Appellant,

v

SC: 89139
COA: 117233
LC: 88-046078-FH

ELTON NASH,

Defendant-Appellee.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

August 28, 1990

/s/CORBIN R. DAVIS, Clerk

ORIGINAL

Supreme Court, U.S.
FILED
DEC 21 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-817

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

* * * * *

PEOPLE OF THE STATE
OF MICHIGAN,

Petitioner,

-vs-

ELTON NASH,

Respondent.
_____/

ON PETITION FOR A WRIT OF CERTIORARI

TO THE MICHIGAN COURT OF APPEALS

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

AFFIDAVIT

RESPONDENT'S BRIEF IN OPPOSITION

PROOF OF SERVICE

By: John A. Vos (P38643)
Court Appointed Attorney for Respondent
200 North Division Avenue
Grand Rapids, Michigan 49503
616/235 0134

No. 90-817

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

* * * * *

PEOPLE OF THE STATE
OF MICHIGAN,

Petitioner,

-vs-

ELTON NASH,

Respondent.
_____/

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, Elton Nash, who is now held in a Michigan State Correctional Facility, asks leave to file the attached Brief in Opposition to a Petition for a Writ of Certiorari to the Michigan Court of Appeals (without prepayment of costs) and to proceed in forma pauperis pursuant to Rule 39 of the rules of this Court.

The Respondent's Affidavit in support of this motion is attached hereto.

BY: _____

JOHN A. VOS (P38643)
Court Appointed Attorney for
Respondent
200 North Division Avenue
Grand Rapids, Michigan 49503
616/235 0134

DATED: December 20, 1990

No. 90-817

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

* * * * *

PEOPLE OF THE STATE
OF MICHIGAN,

Petitioner,

-vs-

ELTON NASH,

Respondent.
_____/

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, Elton Nash, being duly sworn, depose and say that I am the Respondent in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefore; that I believe I am entitled to redress; and,

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? Yes ____ No X

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

1911, Gross Income, Approximately $600 per month

2. Have you received within the past twelve months any income from any of the following sources?

a. Business, profession or form of self-employment?

Yes ____ No X

b. Rent payments, interest or dividends?

Yes ____ No X

c. Pensions, annuities or life insurance payments?

Yes ____ No X

d. Gifts or inheritances?

Yes ____ No X

e. Any other sources?

Yes ____ No X

If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account?

Yes X No ____ (Include any funds in prison accounts.)

If the answer is yes, state the total value of the items owned.

[illegible] account

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Yes ____ No X

If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support.

None

I understand that a false statement or answer to any question in the affidavit will subject me to penalties for perjury.

ELTON NASH, Respondent

Subscribed and sworn to before me
this 20th day of December, 1990.

_____, Notary Public
_____ County, Michigan
My commission expires: _____

DAVID R. KLEINHARDT, Notary Public
Ionia County, Michigan
Acting In Montcalm County
My Commission Expires 11-23-91

No. 90-817

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

* * * * *

PEOPLE OF THE STATE
OF MICHIGAN,

Petitioner,

-vs-

ELTON NASH,

Respondent.
_____/

RESPONDENT'S BRIEF IN OPPOSITION

By: John A. Vos (P38643)
Court Appointed Attorney for Respondent
200 North Divison Avenue
Grand Rapids, Michigan 49503
616/235 0134

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COUNTER STATEMENT OF QUESTION PRESENTED

WHETHER THE MICHIGAN COURT OF APPEALS CORRECTLY DECIDED THAT WHERE A POLICE OFFICER APPROACHES WITH HIS PATROL CAR A PEDESTRIAN WALKING DOWN THE SIDEWALK AT APPROXIMATELY 3:30 A.M., EXITS HIS PATROL CAR FULLY UNIFORMED AND ARMED WITH A REVOLVER ON HIS HIP, SHINES HIS FLASHLIGHT ON THE PEDESTRIAN, STOPS HIM, REQUESTS NOT ONE BUT TWO SOURCES OF IDENTIFICATION AND QUESTIONS HIM AS TO HIS DESTINATION AND IDENTIFICATION IN THE PRESENCE OF OTHER ASSISTING UNIFORMED OFFICERS, THE PEDESTRIAN OR INDIVIDUAL HAS BEEN "SEIZED."

COUNTER STATEMENT OF FACTS

The instant case arises out of a September 25, 1988, incident in which an East Grand Rapids police officer stopped and questioned the Respondent, Mr. Elton Nash, upon observing the Respondent walking during the early morning hours in an area allegedly subject to many breaking and enterings. In questioning the Respondent, the officer asked the Respondent to produce identification and the contents of his back pocket. The Respondent produced, among other items, credit cards which bore the names of persons other than himself. As a result, the Respondent was charged with the Unlawful Possession of Credit Cards. Counsel was appointed by the trial court on September 12, 1989, to represent the Respondent in this prosecutorial appeal.

At the October 6, 1988, preliminary examination, police officer Michael R. Ellis testified that on September 25, 1988, he was on duty patrolling an area in which there had recently been a rash of breaking and enterings (preliminary examination transcript [hereinafter "PT"], p. 4). At approximately 3:30 a.m., Officer Ellis noticed a black subject walking eastbound on the north side of the street he was patrolling (PT, p. 5). Officer Ellis stopped and exited his car, greeted the black subject, and asked him what he was doing out at this time of the morning (PT, p. 5). After the black subject informed Officer Ellis that he was just out for a walk, Officer Ellis asked the subject for identification, and the subject produced for the officer parole papers bearing the Respondent's name, Elton Nash (PT, p. 5). Officer Ellis smelled

alcohol on the Respondent's breath and noted that the parole papers indicated that abstention from alcohol consumption was a condition of the Respondent's parole (PT, pp. 5-6) At the officer's request, the Respondent explained that he had come from Metropolitan Hospital and was on his way home (PT, p. 6). The officer noted that the Respondent was walking in what appeared to be the wrong direction to have been coming from the hospital (PT, p. 6). At this time, a second officer, Lieutenant Bowman, pulled alongside Officer Ellis and the Respondent and, while the Respondent was made to wait nearby, Lieutenant Bowman informed Officer Ellis that the Respondent had been a suspect in an incident the night before at another hospital in which a diamond ring was taken from the Respondent's person (PT, pp. 6-7). A third patrol car occupied by Officer Gingerich also pulled up shortly after Lieutenant Bowman (PT, p. 8). Officer Gingerich then confirmed that the information provided by the Respondent as to whom he had been visiting at the hospital did not match information provided by Metropolitan Hospital (PT, p. 8).

Officer Ellis then asked the Respondent for additional identification and the Respondent replied he had no further identification (PT, p. 9). Noting a bulge in the Respondent's back pocket, Officer Ellis asked the Respondent if he would mind emptying the contents of his pockets onto the hood of the patrol car (PT, p. 9). Respondent apparently said he did not mind and complied (PT, p. 9). In examining the items produced by the Respondent, Officer Ellis discovered credit cards containing the

names of persons other than the Respondent (PT, pp. 10-11).

On cross-examination, Officer Ellis testified he had not, on the evening in question and just prior to stopping the Respondent, received any particular reports of ongoing or recent criminal activity in this particular area (PT, p. 11). He testified that prior to the stop he did not see the Respondent engaging in any fertive or threatening gestures, did not see any weapons in the Respondent's possession, and was not investigating any credit card thefts (PT, p. 12). Officer Ellis simply believed the Respondent looked suspicious (PT, p. 12). He stated further that he asked for more identification because he was "just interested in further identification." (PT, p. 13). He testified that he had detained the Respondent for approximately two to three minutes before Lieutenant Bowman arrived in a second patrol car (PT, p. 13).

Near conclusion of the preliminary examination, the Respondent moved to have the charges dismissed, arguing that he was unlawfully detained and that therefore any evidence collected against him must be suppressed. The District Court Judge denied the motion without explanation and bound the Defendant over to stand trial (PT, pp. 20-21).

On February 6, 1989, the Respondent filed in the trial Court a Motion to Suppress and Brief in Support arguing that the initial stop of the Respondent was invalid, and, alternatively, that even if the initial stop was valid, the Respondent was unlawfully detained beyond the scope of the stop based on the

reason given for the stop. At the February 7, 1989, motion hearing, Officer Ellis testified that the area wherein the Respondent was stopped had experienced recently a large number of breaking and enterings for which there were no leads as of the date he stopped the Respondent. (motion hearing transcript [hereinafter "MT"], p. 5) He testified that "the reason the Respondent was stopped at that particular time was because it was 3:30 in the morning. It was between the times that breaking and enterings had occurred on a regular basis..." and that this was in keeping with his assignment to patrol that area heavily and stop and investigate anything out of the ordinary (MT, p. 6). He testified on direct examination that he stopped and greeted the Respondent and asked him what he was doing in the area at that particular time and where he had come from (MT, pp. 10-11). After the Respondent told him that he was coming from Metropolitan Hospital, the officer noted to himself that the Respondent was in fact walking toward the hospital, Officer Ellis allegedly asked the Respondent for identification (MT, p. 12). On cross examination, however, Officer Ellis said that he asked the Respondent for identification after he had greeted the Respondent, and that after requesting identification, he asked the Respondent why he was in that particular area (MT, pp. 22-25).

In response to Officer Ellis' request for identification, the Respondent produced parole papers with parole conditions that included that the Respondent not consume alcholic beverages (MT, p. 12). Officer Ellis smelled alcohol on the

Respondent's breath (MT, p. 12). While Officer Ellis was reading the parole papers, Lieutenant Bowman pulled up in a second cruiser (MT, p. 13). Officer Ellis then went to speak with Lieutenant Bowman and handed the parole papers to Lieutenant Bowman who recognized the Respondent's name and provided Officer Ellis with further information regarding the Respondent (MT, p. 13). After receiving information from Lieutenant Bowman, Officer Ellis asked the Respondent for further identification (MT, p. 14). When the Respondent indicated that he had no other identification, Officer Ellis shined his flashlight on the respondent's back pocket, noticed a bulge, and asked the Respondent if he would mind emptying the contents of his pocket on the hood of the patrol car (MT, p. 14). Officer Ellis then discovered the credit cards that later formed the basis for the charge (MT, pp. 16-17). Officer Ellis indicated that on the night in question, he never arrested the Respondent (MT, p. 19).

On cross-examination, Officer Ellis confirmed that the Respondent was simply walking down the street just prior to the stop (MT, p. 23). He confirmed that he greeted the Respondent and then asked for identification (MT, p. 22-25). He also confirmed that the parole papers did in fact have on it a picture of the Respondent (MT, p. 25). While Officer Ellis was looking a the parole papers, Lieutenant Bowman pulled alongside of Officer Ellis and the Respondent (MT, pp. 25-26). At this point, the Respondent was not as of yet a suspect in any crime nor under arrest (MT, pp. 26-27). Officer Ellis confirmed that he was shining his

flashlight on or at the Respondent while questioning him, and that he had a revolver on his hip (MT, p. 28). Prior to leaving the Respondent, there were a total of three patrol cars alongside of the Respondent (MT, p. 29).

The trial court granted the Respondent's Motion to Suppress, holding that the initial stop was indeed invalid since it was not based upon any specific complaints of criminal activity involving the Respondent. The trial judge found further that the Respondent could reasonably believe he was not free to leave and that there was therefore an unlawful detention of the Respondent as well. The trial court then dismissed the charges against the Respondent.

The Petitioner subsequently filed a Motion for Rehearing, which rehearing was held on March 17, 1989. At this hearing, the trial court clarified that while the initial encounter may have been lawful, this encounter developed into an unlawful detention. The Respondent's Motion for Suppression of the credit cards and dismissal of the charges was therefore affirmed.

The Petitioner then appealed to the Michigan Court of Appeals arguing that the trial court erred in finding that the Respondent had been "seized." In an unpublished March 16, 1990, per curiam opinion, the Court of Appeals affirmed the trial court's order suppressing the credit cards and dismissing the charges.

On April 3, 1990, the Petitioner moved for Rehearing in

the Michigan Court of Appeals. The Michigan Court of Appeals denied the Petitioner's Motion for Rehearing on May 17, 1990. On May 23, 1990, the Petitioner filed with the Michigan Supreme Court an Application for Leave to Appeal. In an August 28, 1990, Order, the Michigan Supreme Court denied the Petitioner's Application for Leave to Appeal.

LAW AND ARGUMENT

REASONS FOR DENYING THE WRIT

I. THE MICHIGAN COURT OF APPEALS CORRECTLY DECIDED THAT WHERE A POLICE OFFICER APPROACHES WITH HIS PATROL CAR A PEDESTRIAN WALKING DOWN THE SIDEWALK AT APPROXIMATELY 3:30 A.M., EXITS HIS PATROL CAR FULLY UNIFORMED AND ARMED WITH A REVOLVER ON HIS HIP, SHINES HIS FLASHLIGHT ON THE PEDESTRIAN, STOPS HIM, REQUESTS NOT ONE BUT TWO SOURCES OF IDENTIFICATION AND QUESTIONS HIM AS TO HIS DESTINATION AND IDENTIFICATION IN THE PRESENCE OF OTHER ASSISTING UNIFORMED OFFICERS, THE PEDESTRIAN OR INDIVIDUAL HAS BEEN "SEIZED."

Respondent submits that the facts of the instant case, contrary to what the Petitioner contends, are not unique and do not raise any Fourth Amendment question left unanswered by this Court or Michigan State Courts. In fact, this Court's decision in *Michigan v Chesternut*, 486 U.S. 567; 108 S Ct 1975; 100 L Ed 2d 565 (1988), *Florida v Royer*, 460 U.S. 491; 103 S Ct 1319; 75 L Ed 2d 229 (1983), and other clarifying Federal and Michigan State Court decisions adequately provided the Michigan Trial and Appellate Courts with the ability to correctly decide that where

a police officer drives up next to a pedestrian walking down the sidewalk at approximately 3:30 a.m., exits his patrol car fully uniformed and armed with a revolver on his hip, shines a flashlight on the pedestrian, stops him, requests not one but two sources of identification, and questions him as to his destination and identification in the presence of other assisting uniformed officers, the pedestrian or individual has been "seized." There are no special and important reasons for this Court to exercise its judicial discretion and grant the petitioner's petition for a writ of certiorari or other plenary review in this case.

The Petitioner is arguing that the evidence suppressed by the trial Court and found properly suppressed by the Michigan Court of Appeals was discovered not as a result of a lawful *Terry* stop, see *Terry v Ohio*, 392 U.S. 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968), but rather, a first-tier police-citizen encounter described by this Court in *Florida v Royer, supra*, and that the respondent was therefore never "seized" within this Court's legal definition of "seizure" and that the evidence should therefore not have been suppressed. Essentially, the Petitioner contends that the Respondent willingly and without hesitation engaged in a conversation with the police officer, and divulged or disclosed incriminating evidence to the officer, even though he knew or should have known that he was free to go and free to end the conversation at any time. Respondent submits now on the contrary, as the Michigan Trial Court found and Michigan Court of Appeals affirmed, under the circumstances the Respondent was in fact

seized and seized unlawfully.

At the initial suppression hearing, the trial court appeared to indicate that there was no basis for a *Terry* stop because the officer had no specific reports of any criminal activity afoot that might involve the Respondent. The trial court held that the officer therefore lacked any reasonable suspicion to believe the Respondent was engaged or had engaged in criminal conduct, citing *Brown v Texas*, 443 U.S. 47; 61 L Ed 2d 357; 99 S Ct 2637 (1979). Although the trial court did not use the term "seize", it had little difficulty finding that the Respondent was "stopped" and "detained" and that someone in his position could reasonably have believed he was not free to go, and therefore the officer was required to be armed with the "reasonable suspicion" required under *Brown, supra*. On Rehearing, the trial court remained convinced that there was no basis for a *Terry* stop, and remained convinced that the officer's conduct amounted to a "stop." The trial court however elaborated further, indicating exactly when the encounter with the Respondent developed into an unlawful "seizure". The trial court found that the officer's request for identification coupled with the finding that the Respondent could reasonably believe that he was not free to go amounted to an unlawful "seizure". Respondent submits that the trial court was correct in finding that a seizure had in fact occurred. Moreover, the Respondent submits that he was "seized" even before the officer asked for his identification.

As the Petitioner explains, the Supreme Court in *Florida*

v Royer, supra, divided police-citizen encounters into three categories or tiers, an analysis that was approved by the Michigan Supreme Court in *People v Shabaz*, 424 Mich 442; 378 NW 2d 451 (1985). The first tier consists of mere communication which involves no element of detention or coercion, e.g., an officer asking a person questions in a public place. *Shabaz, supra*, Page 56. There is no requirement of reasonable suspicion or probable cause for this type of encounter. If an officer merely approaches an individual on the street or in a public place, and asks the individual if he is willing to answer questions, and the individual volunteers answers, such answers may be used against him. *Royer*, 460 U.S. 491. It is this category or tier into which the Petitioner seeks to cast the encounter in the instant case between the Respondent and the police officer. Respondent disagrees.

This Court in *Michigan v Chesternut, supra*, reiterated its directive that any assessment as to whether police conduct amounts to a seizure implicating the Fourth Amendment must take into account all the circumstances surrounding the incident in each individual case, and the police can be said to have seized an individual only if, in view of all the circumstances surrounding, a reasonable person would have believed he was not free to leave:

> "The test is necessarily imprecise, because of its design to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation. Moreover, what constitutes a restraint on liberty prompting a person to

> conclude that he is not free to "leave" will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs." (100 L Ed 2d 572)

In *Chesternut*, the respondent, after observing a patrol car nearing the corner where he stood, turned and began to run. The patrol car followed the respondent "to see where he was going." As the patrol car drove alongside the respondent for a short distance, the respondent dropped a number of packets containing codeine. The respondent stopped and was arrested and charged with possession of narcotics. The presiding Magistrate dismissed the charges at the preliminary hearing holding that the police chase could not be justified on the mere fact that the suspect ran at the site of the police. The trial Court upheld the dismissal, the Michigan Court of Appeals affirmed, and Michigan Supreme Court denied leave to appeal. The United States Supreme Court found that the respondent was not seized by the police before he discarded the packets containing the narcotics, stating that:

> "Without more, the police conduct here--a brief acceleration to catch up with the respondent, followed by a short drive alongside him--was not "so intimidating" that the respondent could reasonably have believed that he was not free to disregard the police presence and go about his business." (100 L Ed 2d 523)

As is clear from the Court's statements in *Chesternut*, all of the circumstances, including the setting, police conduct

etc., must be considered in deciding whether a reasonable person would have believed he was not free to leave. Respondent submits that the instant case involves much more police conduct than in *Chesternut*. In the instant case, the officer approached the Respondent first by driving his vehicle up to the Respondent and at 3:30 a.m. exited his patrol car armed and in uniform and walked up to the Respondent shining a flashlight at Respondent. The officer greeted Respondent, asked him what he was doing out at 3:30 a.m., and then requested identification from the Respondent (P.T., Page 5; M.T., Pages 22-24). The Respondent then handed his parole papers to the officer in an effort to produce identification. Before long, two more officers and two more patrol cruisers arrived at the scene. At no time did the officer inform the Respondent that he was free to leave or end the conversation or inquiry. At no time did the officer ever ask the Respondent if he would mind answering some questions. Additionally, the officer retained the Respondent's parole papers throughout the encounter. As the trial Court Judge stated in the instant case:

> "[Respondent] was in a situation where a person in obvious authority, a uniformed officer armed and with flashlights and ultimately re-enforced by two other uniformed officers, certainly created an on-the-street police dominated atmosphere in which it seems to the Court, there would be a reasonable question in the Defendant's mind as to whether his freedom of movement was being significantly interfered with by authorities.

> Still, while he was not placed under arrest by the exercise of any magical words by the police and was not handcuffed or put into a cruiser and, indeed, was ultimately released, it seems to the Court that there is a reasonable basis for the Defendant to believe at the time of these inquiries by one, then two, then three officers, that he, indeed, was detained by police on the street and was not free to go even though, as Officer Ellis tells us, he certainly was." (M.T., Page 43)

Additionally, it should be noted that the officer himself labeled and referred to his encounter with the Respondent as a "stop" (M.T., Page 6). In view of the circumstances, it is correct to say that from the outset of the encounter or stop, the Respondent could reasonable have believed he was not free to "disregard the police presence and go about his own business." Even assuming the encounter began as a first-tier encounter, the encounter transformed into the stop-and-identify detentioner situation held unconstitutional in *Kolender v Lawson*, 461 U.S. 352; 103 S Ct 1855; 75 L Ed 2d 903 (1983).

The Petitioner cites *U.S. v Mendenhall*, 446 U.S. 544; 100 S Ct 1870; 64 L Ed 2d 497 (1980), in support of its contention that the encounter in the instant case was a first-tier encounter. However, just as this Court in *Royer, supra*, distinguished *Royer* from *Mendenhall*, 460 U.S. 504 fn. 9, the instant case is likewise distinguishable for some of the same reasons. In *Mendenhall*, the setting was entirely different. The respondent was walking in an airport concourse with other people. The respondent's ticket and

identification were immediately returned to her and the officers were careful to advise her that she could lawfully decline the search. Along this line, the Respondent notes that this Court in *Royer* mentioned that by "informing [*Royer*] that she was free to go if she so desired, the officers might have avoided any claim that the encounter was anything but a consensual matter from start to finish." (460 U.S. 504). Additionally, this Court in *Mendenhall* noted that the agents in that case wore no uniforms and displayed no weapons. This Court further stated that:

> "[e]xamples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person or the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." (446 U.S. 554) (Emphasis added)

The coercive effects or atmosphere is much more apparent in the instant case.

The facts in *Mendenhall* involve an airport stop as do the facts in *United States v Lehman*, 798 F 2d 692 (CA 4, 1986), another case cited by the Petitioner in his Petition and Brief to this Court, which stops are often addressed differently by the Courts and present a setting in which one would be less likely to believe, if approached by an uniformed officer, that he or she was not free to go, than if approached at 3:30 a.m. by a uniformed and armed police officer who had just pulled up in a patrol car and exited with a flashlight shining on the individual approached.

Additionally, the Courts have recognized the need for voluntary police-citizen encounters, particularly in airports, in order to enforce laws aimed at curbing drug use. *United States v $73,277.00 United States Currency*, 710 F 2d 283 (CA 7, 1983).

The facts in *U.S. v Maragh*, 894 F 2d 415 (D.C. Cir., 1990), another case cited by the Petitioner, also involved a stop by plainclothes drug interdiction police officers at a train depot at approximately 4:00 p.m. resulting in the finding of illegal drugs. It is interesting to note that the Court in *Maragh* stated that in order to properly determine whether police have seized a citizen the Court will look to such factors as "whether the officers displayed weapons, were physically intimidating or threatening, or approached the citizen at an unusual place or time." (894 F 2d 418). In the instant case, there exists the factors of visible weapons and an unusual time. See also *U.S. v Brady*, 842 F 2d 1313, 1314 (D.C. Cir., 1988). Respondent also notes that the United States Court of Appeals in *Gomez v Turner*, 672 F 2d 134 (D.C. Cir., 1982), another case cited by the Petitioner, stated in a footnote "That citizens can walk the streets, without explanations or formal papers, is surely among the cherished liberties that distinguish this nation from so many others." (672 F 2d 143, 144, fn 18).

Respondent finds instructive two United States District Court cases on the issue of whether and when a seizure occurs. In *U.S. v Price*, 680 F Supp 833 (N.D. Tex., 1988) the Court found that what began as a permissible contact escalated into a seizure

when the officer identified himself as a narcotics agent and asked the defendant if the officer could retrieve and search the defendant's baggage. The Court noted that no seizure occurred when the officers initially approached the defendant since the officer asked to speak with the defendant and the defendant agreed. The Court also indicated other factors that would strongly suggest a seizure, namely (1) that identification was retained by the officers, (2) that defendant was not capable in light of his education or intelligence, of "knowing consent," and (3) that defendant was never told that he could decline to speak with the officers or refuse to consent to their request. The Court stated that *U.S. v Mendenhall, supra*, held that whether the defendant was ever told he could decline to speak with the officers or refuse to consent to their request is highly relevant to the determination that any consent was proffered voluntarily. Respondent submits that analyzing the instant case in light of the factors found significant by both the U.S. Supreme Court and Federal District Court, it is clear that the Respondent was "seized" even before he was asked for identification. Any doubt as to whether he was seized or not is eliminated when the officer asked to examine the contents of his back pocket and wallet.

In *U.S. v Schumaker*, 577 F Supp 590 (1983), the Court found that a D.E.A. agent and accompanying officers did not violate the Fourth Amendment when they approached the defendant and questioned him. The Court found significant the fact that the officers were dressed casually and not in uniform, that the

defendant's identification was not retained by the agent or officers, that the D.E.A. agent informed the defendant upon approaching him that he did not have to speak with the officers, and that the defendant was approached in a well-lit spacious public airport concourse where other people could be seen walking about.

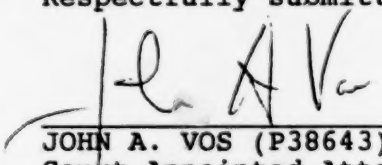
Respondent submits that it is clear that he was "seized" in his encounter with the officer, and would contend that this "seizure" occurred even prior to the request for identification in light of all the circumstances surrounding the incident. The officer undoubtedly could have informed the Respondent that he was not required to answer questions or comply with his request. While the officers commitment to curb the number of breaking and enterings in the area is admirable, Respondent submits that this societal interest in law enforcement must yield to a more compelling interest, namely, a citizen's constitutionally protected interest in privacy. Under the facts in the instant case, a reasonable man travelling down the sidewalk after dark and approached and questioned in the manner in which the Respondent was by the officer in the instant case would not have felt that he was "free to leave" or "free to disregard the questions and walk away." *Mendenhall*, 446 U.S. 554. Respondent submits that the instant case presents exactly the type of random patrol or arbitrary interference and detention the Fourth Amendment was meant to protect against.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition for a Writ of Certiorari and other relief requested by the Petitioner in his Petition and Brief.

DATED: December 21, 1990

Respectfully submitted,



JOHN A. VOS (P38643)
Court Appointed Attorney for Respondent
200 North Division Avenue
Grand Rapids, Michigan 49503
616/235 0134

No. 90-817

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

* * * * *

PEOPLE OF THE STATE
OF MICHIGAN,

Petitioner,

-vs-

ELTON NASH,

Respondent.
_____/

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF KENT)

JOHN A. VOS, first being duly sworn, deposes and says that on the 21st day of December, 1990, he served to the Clerk of this Court by first-class mail, postage prepaid, and bearing a post mark showing that the document was mailed on or before the last day for filing pursuant to Rule 29 of the rules of the United States Supreme Court the following:

On Petition for Writ of Certiorari to the Michigan Court of Appeals, Motion for Leave to Proceed in Forma Pauperis, Affidavit, Respondent's Brief on Opposition, Proof of Service

and he mailed one copy of same to:

Kent County Prosecutor
416 Hall of Justice
333 Monroe Avenue, N.E.
Grand Rapids, Michigan 49503

Attorney General
Law Building
525 West Ottawa
Lansing, Michigan 48913

JOHN A. VOS

Subscribed and sworn to before me
this 21st day of December, 1990.

Melinda Zoerman

Melinda Zoerman, Notary Public
Kent County, Michigan
My commission expires: 5-17-94

JOHN A. VOS
Attorney at Law
200 NORTH DIVISION AVENUE
GRAND RAPIDS, MICHIGAN 49503
TELEPHONE: (616) 235-0134

December 20, 1990

United States Supreme Court
Clerk of the Court
Washington, D.C. 20543

RE: PEOPLE OF THE STATE OF MICHIGAN v ELTON NASH
Trial Court No: 88-46078-FH
Michigan Court of Appeals No: 117233
Supreme Court Case No: 89-139
United States Supreme Court Case No: 90-817

Dear Clerk:

Enclosed for filing please an original and eleven (11) copies of a Motion for Leave to Proceed in Forma Pauperis, Affidavit, Defendant's Brief in Opposition and Proof of Service in connection with the above-referenced matter.

Thank you for your attention to this matter. Should you have any questions or concerns, please do not hesitate to call.

Sincerely,

John A. Vos

JAV:mjz

Enclosures

cc: Attorney General
Kent County Prosecutor
Mr. Elton Nash
File

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90-817

IN THE

SUPREME COURT OF THE UNITED STATES

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NOV 2 3 1990
OFFICE OF THE CLERK
SUPREME COURT, U.S.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

v

ELTON NASH,

Respondent.

PROOF OF SERVICE

PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

STATE OF MICHIGAN)
)
County of Kent)

Carol J Bamford, being first duly sworn, deposes and says that on the 21st day of November, 1990, she served a copy of the above captioned cause upon John Vos by regular mail, by then and there placing the same in an envelope, postage prepaid, properly addressed:

John Vos
Attorney at Law
200 N. Division
Grand Rapids, MI 49503

and placing the same in the United States Post Office at Grand Rapids, Michigan.

Carol J. Bamford

Subscribed and sworn to before me this 21st day of November 1990.

Nadine Y. Mueller
Notary Public, Kent County, MI
My commission expires: Jan. 8, 1991